IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 300

JACOB DVORKIN, PETITIONER

v.

THE UNITED STATES, DEFENDANT.

PETITIONER'S REPLY BRIEF

This is a claim of an employee of the Post Office Department. It is admitted by the Government that he was employed as a driver-mechanic, the salary of which is fixed by Congress at 65c per hour, but that he was only paid at the rate of 55c per hour, which is the compensation of a garageman-driver. The law under which Petitioner was employed provided that said Petitioner might be employed in a dual capacity, and that he should be paid according to the character of work performed.

It is alleged on Page 4, Paragraph 8, of the Petition as follows: (R-3)

> "8. Notwithstanding the terms of the Reclassification Act, above quoted, which provides that driver-mechanics should receive the sum of 65 cents an hour, the Plaintiff has only received the sum of 55 cents per hour, as aforesaid. That the difference between the sum which he should have received during the past five years, namely 65

> cents per hour, and the amount actually paid to him, amounts to the sum of one thousand two hundred dollars ($1,200.00)."

It is further alleged in the Petition, and not denied, that the reason for the failure of Petitioner and a large number of other employees to receive the money due them for a number of years was by reason of a fraudulent conspiracy between an official of the Post Office Department and an official of the Civil Service Commission, who attempted to take advantage of the low salaries then prevailing to secure men at a lower salary than that fixed by Congress.

The lower Court based its decision on the authority of the Coleman case (George L. Coleman v. United States, 100 C. Cls. 41). The Court was misled in this matter. The Coleman case has no application whatsoever. In the Coleman case, the Petitioner alleged that he had been *appointed* as a garageman-driver and therefore under the decisions of the Court of Claims he could not recover any compensation except that of the position to which he had actually been appointed. In the present case, it is specifically alleged that Petitioner was not appointed as a garageman-driver, but was appointed as a driver-mechanic, the salary to which he was denied.

None of the Exhibits filed in the Appendix of Brief for Respondent, excepting that shown on page 14 were ever filed in the Lower Court. Such Exhibits, however, have no effect upon the case. Two of these papers (Pages 17 and 18 of Brief for Respondent in Opposition) are dated May 1, 1941, which was after the date Congress had required the Post Office Department to correct the illegal acts theretofore practiced. None of

the other papers appearing in the said Appendix of Defendant show the *appointment* of Petitioner to any office, but simply a recommendation that he be so appointed.

The question naturally arises why this case should come before this Court in view of the admitted startling facts. The Defendant attempted to justify the position taken on the ground that if the claimant had accepted the lower salary for a period of years, he was estopped from claiming the greater salary.

Petitioner alleged that when he reported for work by direction of the Civil Service Commission he was told that there was no vacancy as a garageman-driver, but that if he could pass an examination as driver-mechanic he would be put to work. The law under which this branch of the Post Office was operated provided that the men might work in a dual capacity and that they should be paid according to the class of work which they performed, regardless of their appointment. When faced with this law in the Lower Court the Government then makes the remarkable defense shown in the Note at the bottom of Pages 8 and 9 of the Brief for the Respondent in Opposition, which reads as follows:

> "While the order of the Fourth Assistant Postmaster General was expressly based upon written authority from the Civil Service Commission, the underlying statutory authority apparently included the Act of March 1, 1929, Section 1, ch. 442, 45 Stat. 1441, 39 U. S. C. 136 (see Appendix A, pp. 10-11, infra), permitting the employment of postal employees in a dual capacity "when in the judgment of the Postmaster General" such employment is required by "the needs and interests

> of the Postal Service" and provided that "the total compensation actually paid for all services does not exceed $2,000 for any one fiscal year." This statute is of no avail to petitioner for the claim period, since (1) his original petition and amended bill of particulars fail to allege that he was actually appointed to serve in a dual capacity, and that his total compensation, if recovery were allowed, would not exceed $2,000 for any one year; and (2) the Postmaster General (through the Fourth Assistant Postmaster General, who by Section 14 (5) of the Postal Laws and Regulations, 1932, was charged with the appointment of personnel in the Motor Vehicle Service) did not, prior to October 27, 1941, make either a general or specific determination that employment of petitioner in a dual capacity was in his "judgment" required by "the needs and interests of the Postal Service."

It will be noted it is contended that Petitioner is barred for two reasons; First, because he failed to allege that he was actually appointed to serve in a dual capacity and also that his total compensation would not exceed two thousand dollars per year, and Secondly, that the Postmaster General had not made a general or specific determination that his employment was, in his judgment, required by the needs and interest of the Postal Service. In answer to the first proposition, it is respectfully submitted that it was specifically alleged on Page 10 of the Amended Petition the nature of service to be performed.

> "Fifth, that at the time the Claimant was put to work, the rules and regulations of the Post Office Department (see below), which have the effect of law, provided that the Post Office Department

should keep a record of the number of hours the employees worked in a dual capacity and that their titles should correspond to the positions to which the employees devoted a greater portion of their time. (Regulation 297 of the Rules and Regulations of the Post Office Department, 1925):

> "Employees' assignments shall, wherever possible, correspond with their roster title. Where the interest of the service requires that an employee perform several duties, his title designation shall correspond to the position to which he is required to devote the greater portion of his time."

The record shows that his salary would not exceed two thousand dollars, because he alleged in the Petition that he only received 55c per hour. With regard to the second contention, namely that it had not been alleged in the Petition that the Postmaster General had determined that in his judgment Petitioner's appointment was required by the needs and interests of the Postal Service, it is respectfully submitted that by his very act in appointing this man, the Postmaster General made a determination that his services were necessary. He could not have made a stronger determination.

The decisions applicable to this case are fully covered in the Petitioners Brief attached to the Petition for Writ of Certiorari. Special reference is made, however, to the case of Glavey v. The United States, 182 U. S. 595, which reads in part as follows:

> "In the Goldsborough Case referred to, Chief Justice Taney said: 'Where an Act of Congress declares that an officer of the Government or public agent shall receive a certain compensation for

his services, which is specified in the law, undoubtedly that compensation can neither be enlarged or diminished by any regulation or order of the President, or of a department, unless the power to do so is given by act of Congress.'

Respectfully submitted,

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